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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DEWANE PATRICK LAW,

Defendant and Appellant.

C045871

(Super. Ct. No.
03F08462)

Following the denial of his motion to suppress evidence, defendant Dewane Patrick Law entered a plea of no contest to possession of methamphetamine for sale (Health & Saf. Code, § 11378) and sale or transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)). Imposition of sentence was suspended, and defendant was placed on probation for five years, which included a condition he serve 365 days in county jail, with credit for 107 days of presentence custody.

Defendant appeals, contending (1) his motion to suppress evidence was wrongfully denied, and (2) the restitution fine (Pen. Code, § 1202.4), drug program fee (Health & Saf. Code, § 11372.7), jail booking fee (Gov. Code, § 29550.2), jail classification fee (Gov. Code, § 29550.2), and court security surcharge (Pen. Code, § 1465.8) must be stricken because they were not part of the oral pronouncement of judgment.

The People concede that the trial court erred in denying the suppression motion. We agree. Accordingly, we shall reverse the judgment and direct the trial court to dismiss the case.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 5:20 p.m. on September 23, 2003, Detective Robert Braman saw a car with two occupants pull into the AAA Residence Inn on Watt Avenue. Based on a "couple of cases" he investigated inside the hotel, Braman opined that it was a "high traffic drug area."¹ His partner, Detective Balfour, who was driving the unmarked police vehicle, pulled into the parking lot behind the car. The occupants had already gotten out of the car.

While Balfour talked to the driver of the car, Braman approached defendant, who was walking on the grassy area of the hotel. From approximately 10 to 15 feet away, Braman asked if he could speak to defendant for a minute. Defendant continued walking. Braman caught up to him and asked again. Defendant, who was now sweating, nervous, and agitated, asked Braman what he

¹ The court found the detective's opinion that the hotel was an "extreme hot bed of drug sales" was "not very convincing."

wanted. Braman questioned whether defendant was on probation or parole. Defendant hesitated, looked nervously toward the ground, and did not respond. When Braman asked again, defendant replied, "no." Braman then requested defendant's identification. Defendant began reaching around his waistband area, waved his hands in the air, and started yelling. Braman "[t]urned him around" and told defendant he was going to pat him down for weapons.

In defendant's right front pocket, Braman felt a powder-type substance wrapped in plastic. Defendant screamed, "I'm going to jail for a long time," began crying, and fell to his knees. Braman retrieved the plastic bag from defendant's pocket. After defendant was handcuffed, Braman performed a records check that revealed defendant was on formal searchable probation until 2007. The parties stipulated that Braman searched defendant without a warrant.

In denying defendant's motion to suppress the evidence, the trial court ruled that Braman unlawfully detained defendant when he "engaged in a course of conduct that would cause 98 percent of the public to . . . [become] agitat[ed]," and then used that agitation to require defendant to identify himself and submit to a pat-down search. Nevertheless, the court held that the search was lawful because defendant was subject to a probationary search condition.

The trial court reasoned that the California Supreme Court's decision in *People v. Sanders* (2003) 31 Cal.4th 318 (hereafter *Sanders*) "did not retreat from" or "criticize" *In re Tyrell J.* (1994) 8 Cal.4th 68 (hereafter *Tyrell J.*), which held that an

otherwise unlawful pat-down search of a juvenile can be upheld based on a probation search condition of which the officer was unaware at the time of the search.

DISCUSSION

In reviewing the denial of a motion to suppress evidence, we defer to the trial court's express or implied factual findings if supported by substantial evidence. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) In determining the legality of a search, we apply our independent judgment. (*Id.* at p. 362.)

Defendant contends the search could not be justified by his probationary status because Braman was unaware that defendant was subject to a search condition when he was detained and searched. The People properly concede that the search cannot be upheld based on defendant's probationary status and do not urge other grounds for upholding the search. Thus, the People agree with defendant that the judgment must be reversed. We accept the concession.

Sanders held that evidence seized in an otherwise unlawful search of a parolee's residence cannot be used against either the parolee or a cohabitant based on a parole search condition that was unknown to the officers when the residence was searched. (*Sanders, supra*, 31 Cal.4th at pp. 331-332.) Although *Sanders* distinguished but did not overrule *Tyrell J.*, there can be no doubt *Sanders* held that "an otherwise unlawful search of the residence of an adult parolee may not be justified by the circumstance that the suspect was subject to a search condition of which the law enforcement officers were unaware when the search was conducted." (*Id.* at p. 335, fn. omitted.) *Sanders* explained that "this result

flows from the rule that whether a search is reasonable must be determined based upon the circumstances known to the officer when the search is conducted and is consistent with the primary purpose of the exclusionary rule--to deter police misconduct." (*Id.* at p. 332.) Reiterating that the expectation of privacy of both the parolee and his or her cohabitant is not eliminated because of the parole search condition (*id.* at pp. 329, 332), *Sanders* noted with respect to the cohabitant that "[a]llowing the People to validate a warrantless residential search, after the fact, by means of showing a sufficient connection between the residence and any one of a number of occupants who happens to be subject to a search clause, would encourage the police to engage in facially invalid searches with increased odds that a justification could be found later. It also would create a significant potential for abuse since the police, in effect, would be conducting searches with no perceived boundaries, limitations, or justification. [Citation.]" (*Id.* at p. 330.) As to the parolee, *Sanders* recognized that "[p]ermitting evidence that has been suppressed as to a cohabitant to be used against the parolee would encourage searches that violate the rights of cohabitants and guests by rewarding police for conducting an unlawful search of a residence." (*Id.* at p. 335.)

This case does not involve a parolee, nor does it involve a search of a residence. Nevertheless, it appears to us that the concern expressed in *Sanders*--that not suppressing the evidence would be inconsistent with the primary purpose of the exclusionary rule--applies equally to an unlawful detention and search of a probationer

where the officer is not aware that the person has a search condition of probation.

Indeed, Division Three of the First Appellate District so held after the suppression motion was denied in this case. (*People v. Bowers* (2004) 117 Cal.App.4th 1261, 1270 (hereafter *Bowers*).) Addressing the effect of *Sanders* on the search of an adult whom the officers did not know was subject to a probation search condition, *Bowers* concluded that the only basis for distinguishing *Sanders* from *Tyrell J.* was "'the special needs' of the system applied to juvenile offenders." (*Bowers, supra*, 117 Cal.App.4th at p. 1268.) "In every other respect, the Supreme Court's discussion of *Tyrell J.* throughout *Sanders* was clearly disapproving." (*Id.* at p. 1269.) Accordingly, *Bowers* held that because the person was not a juvenile probationer, the search violated his Fourth Amendment rights since the officers did not know that he was on probation at the time of the search. (*Id.* at pp. 1269-1271.)

We agree with *Bowers* and conclude that the unlawful search of defendant's person cannot be justified by his probation search condition of which the detective was unaware when he searched defendant. Since the trial court reached the opposite result, we shall reverse the judgment and remand the matter to the trial court with directions to dismiss the case against defendant.

We therefore need not reach the issue of whether the fines and fees should be stricken.

DISPOSITION

The judgment is reversed, and the matter remanded to the trial court with directions to dismiss the case.

SCOTLAND, P.J.

We concur:

RAYE, J.

MORRISON, J.